Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

GARY REYNOLDS QUALLS,
Petitioner,

-vs-

STATE OF ARIZONA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
STATE OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Arizona Court of Appeals err, as a matter of Federal Constitutional Law, in holding that based on the evidence introduced at trial, the Jury Instructions and verdict forms were sufficient to ensure that Petitioner was tried for, and convicted by a jury which unanimously agreed Petitioner committed, the ten (10) offenses alleged in the Indictment.

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OPINION BELOW

On April 13, 1999, the Arizona Court of Appeals issued its non-published memorandum opinion denying Petitioner's Appeal. A copy of the Arizona Court of Appeals opinion is at Appendix A. On October 28, 1999, the Arizona Supreme Court denied review of Petitioner's petition for review. A copy of the order denying review is at Appendix B.

STATEMENT OF JURISDICTION

Petitioner respectfully requests that a Writ of Certiorari issue to review the decision of the Arizona Court of Appeals holding (1) it is not reversible error for the Trial Court to instruct the Jury "it is not necessary that the State prove the exact date or period when the offense occurred" as long as "it occurred on or about the date alleged and that it occurred prior to filing of the indictment" when each of the ten (10) charged sex offenses required proof the conduct occurred prior to the two girls' 15th birth dates; the indictment was filed several years after the two girls' 15th birth dates; numerous "other acts" of sexual conduct occurring subsequent to the two girls' 15th birth dates was admitted into evidence; and Petitioner defended solely on the basis that the sexual relationship with each of the girls began subsequent to their respective 15th birth dates; (2) it is not reversible error for the Trial Court to fail to either instruct the State to elect which ten (10) acts it relies upon in support of conviction on each of the ten counts or, alternatively, instruct the Jurors they must unanimously agree on one specific act before returning a guilty verdict on any one count where the evidence of numerous "other acts" of sexual misconduct was admitted into evidence during the periods of time alleged in each count of the indictment. (See Appendix C). The Arizona Court of Appeals issued its Opinion denying the Petitioner's Appeal on April 13, 1999. (Appendix A). The Arizona Supreme Court denied the Petitioner's Petition for Review on October 28, 1999. (Appendix B) Petitioner timely filed his Petition for Writ of Certiorari within ninety (90) days of that decision. This Court has jurisdiction pursuant to *United States Constitution Article III*, Section 2; 28 U.S.C. §1254; and *Supreme Court Rules* 10 and 13, 28 U.S.C.

PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall...deprive any person of life, liberty, or property, without due process of law....

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall...be subject for the same offence to be twice put in jeopardy of life or limb;....nor be deprived or life, liberty, or property, without due process of law;...

The Sixth Amendment to the Unites States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,...and to be informed of the nature and cause of the accusation;...

At all pertinent times to the instant case, Arizona Revised Statutes ("A.R.S.") §13-1405 provided:

> A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.

> B. Sexual conduct with a minor under fifteen years of age is a class 2 felony and is punishable pursuant to §13-604.01. Sexual conduct with a minor fifteen years of age or over is a class 6 felony.

At all pertinent times to the instant case, Arizona Revised Statutes §13-1410 provided:

> A person who knowingly molests a child under the age of fifteen years by directly or indirectly touching the private parts of such a child or who causes a child under the age of fifteen years to directly or indirectly touch the private parts of such person is guilty of a class 2 felony and is punishable pursuant to §13-604.01.

Rule 13.2(a), Arizona Rules of Civil Procedure provides:

> The indictment of information shall be a plain, concise statement of facts sufficiently definite to inform the defendant of the offense charged.

Rule 13.3(a), Arizona Rules of Civil Procedure provides:

> Provided that each is stated in a separate count, 2 or more offenses may be joined in an indictment, information, or complaint, if they:
>
> > (1) Are of the same or similar character; or

(2) Are based on the same conduct or are otherwise connected together in their commission; or

(3) Are alleged to have been a part of a common scheme or plan.

STATEMENT OF THE CASE

Procedural History of the Case

On November 20, 1997 Petitioner was indicted for one count of child molestation and four counts of sexual conduct against each of Petitioner's stepdaughters, S.T. and J.T.; conduct prohibited against minors under the age of 15 years pursuant to A.R.S. §§13-1405(B) and 13-1410.[1] The indictment alleged the conduct to have occurred at times shortly before the two girls' respective 15th birth dates "on or about" various spans of time between September of 1985 and September of 1990. (Appendix C).

At trial, S.T. and J.T. alleged the sexual misconduct began prior to their respective 15th birth dates and testified to numerous acts proscribed by A.R.S. §§ 13-1405(B) and 13-1410 occurring during the dates alleged in the indictment. However, pursuant to the Trial Court's evidentiary rulings, the girls were also permitted to testify

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[1] Arizona Revised Statute §§ 13-1410 and 13-1405(B) provide:

13-1410
A person who knowingly molests a child under the age of fifteen years by directly or indirectly touching the private parts of such a child or who causes a child under the age of fifteen years to directly or indirectly touch the private parts of such person is guilty of a class 2 felony and is punishable pursuant to §13-604.01.

13-1405(B)
Sexual conduct with a minor under fifteen years of age is a class 2 felony and is punishable pursuant to §13-604.01. Sexual conduct with a minor fifteen years of age or over is a class 6 felony.

to numerous "other acts" of uncharged criminal conduct occurring subsequent to their respective 15th birth dates (*see* A.R.S. §13-1405(A)) and to non-criminal conduct occurring subsequent to the girls' 18th birth dates. Petitioner did not dispute he had a sexual relationship with the two girls. However, he denied it started prior to either of the girls' 15th birth date and, therefore, argued he was not guilty of the 10 charged offenses.

Prior to charging the Jury, Petitioner objected to the State's proposed instructions which he argued were misleading and would preclude the jury from unanimously determining which act(s) constituted the ten (10) charged offenses and also would permit the jury to convict based upon any of the numerous "other acts" of sexual conduct, including those which occurred subsequent to the girls' 15th birth dates which the Petitioner did not deny and which were not the subject of the ten (10) count indictment.

At the close of evidence, the Trial Court instructed the jury "it is not necessary that the State prove the exact date or period when the offense occurred" as long as "it occurred on or about the date alleged and that it occurred prior to the filing of the indictment". (Appendix D) The verdict forms similarly permitted the jury to convict for offenses occurring "on or about" the dates alleged. (Appendix E)

On February 11, 1998, the jury found Petitioner guilty of all counts. On March 9, 1998, the Trial Court sentenced Petitioner to 194 years in prison.

On Appeal, Petitioner challenged the legality of the jury instructions. Petitioner argued the instructions constructively expanded the indictment permitting the jury

to convict for any of the numerous "other acts" of uncharged or non-criminal conduct introduced into evidence, many of which occurred subsequent to the two girls' 15th birth dates. The Arizona Court of Appeals held "the State does not have to prove an exact date in these circumstances (citations omitted) particularly since the Petitioner does not allege he was prejudiced in his defense. (Citations omitted). There is no error necessitating reversal." (Appendix A at 13)

Petitioner also challenged the Trial Court's failure to either instruct the State to elect which ten (10) acts of the hundreds of acts testified to, it relied on in support of conviction, or alternatively, to instruct the jurors it must unanimously agree on which specific acts supported conviction on each of the ten (10) charged offenses. The Arizona Court of Appeals held "The Jury was instructed to the requisite unanimity of its verdict on each count. The Petitioner made no objection to the absence of instructions of which he now complains. We, therefore, review only for fundamental error, (citation omitted) and we find none." (Appendix A at 13).

Petitioner argued this problem was further compounded by the failure of the indictment itself to require proof the sexual conduct occurred prior to the girls' 15th birth dates by alleging the offenses occurred "on or about" various spans of time shortly before the two girls' 15th birth dates. This "on or about" language preceding each count of the incident permitted the jury to convict for uncharged or non-criminal conduct occurring subsequent to the girls' 15th birth dates as long as the jury determined the conduct occurred "on or about" the spans of time alleged in each count and, therefore, rendered each count jurisdictionally and fatally defective for failure to allege

time particularity, a substantive, material element of both A.R.S. §13-1405(B) and §13-1410. Moreover, each of the five (5) counts pertaining to each victim was completely devoid of any specific facts identifying the nature of the acts, place of occurrence, or the circumstances of the alleged offenses. Consequently, the time component of the five (5) offenses pertaining to each victim was the only fact which attempted to distinguish one count from another. However, the "on or about" language destroyed time particularly as the sole distinguishing factor between counts by improperly expanding the span of time beyond the range alleged in one count, invading that of the others, making it impossible for the jury to distinguish one count from another. (Appendix C)

Petitioner petitioned the Arizona Supreme Court for review. In addition to others, Petitioner presented the following issues for review:

> Did the Trial Court err when instructing the jury "It is not necessary that the State prove the exact date or period when the offense occurred." before convicting for molestation and sexual conduct with a child under the age of 15 years?
>
> With respect to each count, did the Trial Court err in failing to require the State to elect the particular act it relied upon in support of conviction, or alternatively, instruct the jury it must collectively agree on one specific act in support of a unanimous verdict?

Was the indictment insufficient as a matter of law?

Facts of the Case

"ST" was born on September 30, 1972. Her sister, "JT," was born on January 12, 1976. Their mother divorced the girls' father in 1980 and married the Petitioner in 1981. In 1996, when ST was 24 years old and JT was 20 years old, their mother and father were separated and contemplating divorce. In June 1996, the girls told their mother and father they had each been involved in a long standing sexual relationship with the Petitioner for the last several years which had continued into their early twenties.

The trial began on 2/4/98. At trial ST and JT alleged the sexual misconduct began prior to their respective 15th birth dates. Pursuant to the Court's pretrial rulings, the girls were permitted to testify to numerous uncharged and non-criminal "other acts" of sexual conduct under Rule 404(B) occurring subsequent to the girls' 15th birth dates up through and until the relationships ended when the girls were in their early twenties.

At trial, Petitioner admitted the sexual relationship with both girls. However, he testified the sexual relationship with each of the girls did not begin until they were 16 years old. He testified he previously lied to the girls' mother, the police, and a therapist about when the sexual relationship with the girls started to protect the girls' reputations. Petitioner's testimony was corroborated at trial by Petitioner's two children. Petitioner's son, Shane Qualls, testified that both ST and JT had told him the sexual relationship started about the time they started driving,

when they were sixteen (16) years old. Petitioner's daughter, Christina Allen, testified the girls' mother had told her she believed the sexual relationship with the two girls didn't start until sometime after the girls had turned fifteen (15).

REASON WHY THE WRIT SHOULD ISSUE

This Court should grant the Petition for Writ of Certiorari because the Arizona Court of Appeals has decided an important Federal question in direct conflict with decisions of this Court, the Federal Circuit Courts of Appeal, the Appellate Courts of Arizona and other states that recognize it is reversible error for a Trial Court to give instructions that permit the jury to convict the defendant for conduct that was not charged, by constructively amending an Indictment through its instructions to the jury. Based upon the numerous "other acts" of sexual misconduct introduced at trial, the Trial Court's failure to properly instruct the jury precluded the jury from identifying, separating and deliberating the evidence of each offense from the "other acts" constituting a violation of Petitioner's Fourteenth Amendment Due Process and Fifth and Sixth Amendment Rights.

The Trial Court made two fundamental mistakes in instructing the jury. First, the Trial Court constructively amended the Indictment by improperly instructing the jury they could convict for conduct occurring "on or about" the various spans of time alleged in each count, "as long as the acts occurred prior to the filing of the indictment" in 1997.[2] Based upon this instruction, the jury was free to convict based upon any of the uncharged and/or non-criminal "other acts" introduced at trial which occurred subsequent to the

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[2] The indictment was filed on November 20, 1997, 10 years after S.T. turned 15 years old on 9/30/87 and 6 years after J.T. turned 15 years old on 1/12/91.

girls' 15th birth dates.[3] By stating "the State does not have to prove an exact date in these circumstances", the decision of the Arizona Court of Appeals incorrectly holds the victims' age is immaterial to the alleged violations of A.R.S. §§13-1405(B) and 13-1410. Second, the Trial Court erred by failing to either require that the State identify the ten (10) particular acts relied upon in support of conviction on each count, or alternatively, instruct the jury it must collectively agree on one specific act in support of a unanimous verdict on each count. Due to the multitude of generic non-time specific "other acts" of sexual misconduct testified to at trial, there is no reasonable probability of juror agreement as to which particular acts form the basis for the jury's ten (10) guilty verdicts. On the record before the Court, it is impossible to determine whether the jury unanimously found the Petitioner guilty of the ten (10) offenses the State attempted to charge in the ten (10) count Indictment, or convicted for any of the numerous "other acts" of sexual misconduct introduced at trail, many of which occurred subsequent to the two girls' 15th birth dates. "It is axiomatic that a conviction upon a charge not made...constitutes a denial of due process." *Jackson v. Virginia*, 443 U.S. 307, 314, 99 S.Ct. 2781, 2786, 61 L.Ed.2d. 560 (1979) (*citing Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948); *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d. 207 (1978)); *see also Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

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[3] Effective 9/27/90 the legislature amended A.R.S. §§13-1405(B) and 13-1410 from "under the age of 15 years" to read "under the age of 14 years". (Laws 1990 Ch. 38 §4).

The Trial Court's "On or About" Instruction Constructively Expanded the Indictment by Permitting the Jury to Convict for Uncharged Conduct.

The Trial Court's "on or about" jury instruction and verdict forms constructively expanded the Indictment by allowing the jury to convict even if the State could not "prove the exact date or period when the offenses occurred ["as long as]..."it occurred on or about the date alleged and that it occurred prior to the filing of the indictment."[4] The instruction was highly prejudicial. It was in direct conflict with Petitioner's defense and theory of the case as well as A.R.S. §13-1405(B) and 13-1410, the statutes defining "sexual conduct with a minor" and "molestation of a child" which are applicable by definition only if the child is "under the age of fifteen years." Time particularity is a substantive material element of each offense which the State is required to prove beyond a reasonable doubt. The "on or about" instruction constructively amended the indictment by permitting the jurors to convict based upon any of the multitude of uncharged "other acts" of sexual misconduct introduced at trial which occurred subsequent to the girls' 15th birth dates as long as the jury believed the acts occurred "on or about" the dates alleged in the Indictment and "before the filing of the Indictment in 1997." This instruction completely eviscerated and destroyed Petitioner's entire defense in violation of his State and Federal Constitutional Right to Due Process and notice of the nature and cause of the accusation against him. *U.S. Const. Amend V, VI and XIV*; *Arizona Constitution*, Article 2, § 24; Rule 13.2(a), *Arizona Rules of Criminal Procedure*; *Cokeley v. Lockhart*, 951 F.2d 916, 918-921 (8th Cir. 1991); *Woertman v. People*, 804 P.2d 188, 190-93 (1991).

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[4] (Appendix D, Instruction I; Appendix E)

Utilization of an "on or about" instruction is proper when the date of the incident is in question, but only if the evidence establishes only one act and time particularity is not a substantive, material element of the offense in dispute. *People v. Creighton,* 57 Cal. App.3d 319, 29 Cal. Rptr. 249, 252 (App. 1976); *State v. Pace*, 212 P.2d 755, 759 (Or. 1949). In this case, the particular time of the alleged offense was a material element of each of the charges and the central issue in dispute. Under these circumstances, instructing the jury they could convict even if the State could not prove the exact date or period when the offenses occurred constitutes reversible error. The cases relied upon by the Arizona Court of Appeals involved Defendants whose challenge was to the sufficiency of evidence to convict rather than the impropriety of prejudicial jury instructions. In *Jones*, *Smith and Berry* it was undisputed the victims were 10, 6, and 14 years old respectively when the sexual misconduct occurred. There was no evidence of any sexual misconduct occurring subsequent to the children's 15th birth dates. At trial, the defendants in each case denied committing any act of sexual misconduct. Therefore, unlike Petitioner, there was no attempt to defend on the basis of distinguishing between **when** the acts occurred. Because the date of the offenses alleged was not in dispute, the issue of when the offenses occurred was immaterial to the defense. Consequently, the Arizona Appellate Courts held the State need not prove the exact date charged in the information or indictment and **"absent prejudice to Defendant"**, the date of the offense alleged in the indictment is deemed amended to conform to the evidence. (Appendix A, at 13 and 14 citing *Jones*, *Smith*, and *Berry*). *State v. Jones*, 188 Ariz. 534, 543-44, 937 P.2d 1182, 1191-92 (App. 1996)(indictment alleged broad period of time in which molestations occurred); *State v. Smith*, 156 Ariz. 518, 524, 753 P.2d 1174, 1180 (App. 1987)(state does

not have to prove exact date charged); *State v. Berry*, 101 Ariz. 310, 314, 419 P.2d 337, 341 (1966).

By failing to recognize this fundamental distinction, the Arizona Court of Appeals relies upon case law inapposite to the instant case where the central issue in dispute was when the acts occurred. By misstating the law, the Trial Court's instruction permitted the jury to convict based upon any of the uncharged and/or non-criminal "other acts" which occurred subsequent to the girls' 15th birth dates.

"[A] Conviction should not rest on ambiguous and equivicol instructions to the jury on a basic issue." *Bollenbach vs. U.S.*, 326 U.S 607, 613, 66 S.Ct.402, 405, 90 L.Ed. 350 (1946). In the *Cokeley* decision, the United State Court of Appeals, Eighth Circuit, recognized a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. The Court held "This fundamental component of due process, guaranteed under the Sixth Amendment, is incorporated in the Fourteenth Amendment and cannot be abridged by the states." In *Cokeley*, the defendant similarly asserted that the trial judge instructed the jury, and the jury returned a guilty verdict, on a charge not included in the information under which he was prosecuted. The Eighth Circuit noted, " The due process clause does not require states in drafting charging papers to observe the stricter requirements of the Fifth Amendment's indictment clause which applies in federal cases. Indeed, we have stated that the sufficiency of a charging document is 'primarily a question of state law.' (Citations omitted). However, the notice provided by a state must comport with the due process guarantee of a fair trial to state prisoners." *Cokeley*, 951 F.2d 916, 918; *citing Goodloe v. Parratt*, 605 F.2d 1041, 1045 (Eighth Circuit

1979); *citing Alexander vs. Louisiana*, 405 U.S 625, 633, 92 S.Ct. 1221, 1226 31 L.Ed.2d 536 (1972).

As was the case in *Cokeley*, Petitioner formulated his defense in response to the State's formally filed charges of child molestation and sexual abuse of children under the age of fifteen, responding with a complete denial of the charged offenses. Although Petitioner did not deny he and the two girls engaged in a sexual relationship, he adamantly denied the sexual relationship with either of the girls started prior to their sixteenth birth dates. As the Eighth Circuit recognized in *Cokeley*, because the judgment against Petitioner is based upon jury instructions permitting a conviction for a crime not charged, Petitioner has been denied his fundamental right of due process. Because the jury returned a general verdict which did not specify which of the numerous acts of sexual misconduct it found Petitioner had committed, it cannot be determined on the basis of the record whether Petitioner's conviction rested on the contested evidence regarding the charges set forth in the Indictment, or on any of the multitude of "other acts" admitted into evidence. "A conviction based on the latter constitutes a violation of the petitioner's right of due process. [A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient..." *Cokeley* 951 F.2d at 921 *citing Zant vs. Stephens*, 462 U.S. 862 , 881, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235 (1983); *Stromberg vs. California*, 283 U.S. 359, 367-68 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931); *U.S. v. Sales*, 725 F.2d 458, 459 (8th Cir.1984).

Additionally, because the State introduced a vast array of evidence regarding Petitioner's sexual relationship with ST and JT, occurring both during the various time

spans set forth in the ten count indictment, as well as at times subsequent thereto, it is impossible to conclude from the record beyond a reasonable doubt that the jury reached unanimous agreement as to which specific violations occurred. Despite the enormous volume of evidence introduced against Petitioner, the Court "cannot affirm a non-unanimous verdict simply because the evidence is so overwhelming that the jury surely would have been unanimous had it been properly instructed". *U.S. vs. Edmonds*, 80 F.3d 810, 814 (3rd Cir.1996); *U.S. vs. Beros*, 833 F.2d 455, 460 (3d Cir. 1987).

Therefore, Petitioner was deprived of his right to due process of law, sufficient notice of the nature and cause of accusation against him, a fair trial and a unanimous jury verdict under the Fifth, Sixth and Fourteenth Amendments constituting reversible error.

The Trial Court's Failure to Either Require that the State Elect the Ten (10) Acts it Relied Upon in Support of Conviction on each Count or, Alternatively, Instruct the Jury it Must Collectively Agree on One Specific Act in Support of a Unanimous Verdict on Each Count, Constructively Expanded the Indictment by Permitting the Jury to Convict for any of the "Other Acts" Admitted at Trial.

The Trial Court's failure to either require that the State elect upon which ten (10) offenses it relied for conviction, or, alternatively, instruct the jury it must collectively agree on one specific act in support of a unanimous verdict on each count, constructively expanded the Indictment by permitting the jury to convict for any of the "other acts" admitted at trial. This violated Petitioner's Constitutional Rights to be put on trial for a single offense,

and to a unanimous jury verdict with respect to the ten (10) criminal acts for which he was tried, and failed to protect Petitioner from further prosecution for the same offenses. Based upon the State's presentation of the evidence, the 10 count indictment was not based upon ten separate identifiable offenses, but rather upon numerous generic instances of sexual misconduct. Prior to trial the prosecutor advised the Court she intended to introduce evidence of as many as 500 separate incidents involving sexual misconduct. The Court permitted the State to do so by ruling "additional sexual acts, illegal sexual acts that fall into the categories of general actual stimulation, oral sex and intercourse that are beyond the limited five counts of the indictment pertaining to each victim, those are admissible." The Trial Court allowed this evidence in under 404(b), Arizona Rules of Evidence, as "other acts" evidence "to show intent, plan, absence of mistake or accident."

By failing to instruct either the State or jury to identify the ten (10) acts it relied on to support conviction on each count, the Judge's previous ruling admitting the "other acts" resulted in a constructive amendment of the Indictment in violation of the rule which requires that each separate criminal offense must be charged in a separate count of the indictment, rendering the indictment "duplicitous." Rule 13.3(a), A.R.C.P. Duplicitous indictments are strictly prohibited because (1) they fail to give adequate notice of the specific charge to be defended, (2) they present the hazard of non-unanimous jury verdicts and (3) make precise pleading of prior jeopardy impossible in the event of a subsequent prosecution. *Spencer v. Coconino County Superior Court, Div. 3*, 136 Ariz. 608, 610, 667 P.2d 1323 (1983); citing *Wong Tai v. United States*, 273 U.S. 77, 47 S.Ct. 300, 71 L.Ed. 545 (1927).

In *Spencer* the Arizona Supreme Court held a two count indictment based upon evidence of multiple incidents of sexual misconduct failed to properly charge one offense per count. The focus of the legal analysis was the factual basis upon which the two count indictment alleging (1) incest and (2) child molestation was based. According to the witnesses who testified before the grand jury the victim and defendant both had admitted numerous episodes of sexual misconduct.

The Arizona Supreme Court determined the defective indictment not only violated Spencer's right to reasonable notice of the " [specific] criminal acts charged against him" but also put him in jeopardy in only two counts, for any one of what could be as many as 100 separate criminal offenses, failing to protect him from further prosecution for the same offenses. Consequently, the Arizona Supreme Court ordered Spencer's Motion to Dismiss the indictment granted. *Spencer 136 Ariz. at 610-611 citing State v. Tyson, 129 Ariz. 526, 538, 633 P.2d 335, 347 (1981).*

The legal analysis adopted by the Arizona Supreme Court in *Spencer* is controlling here. Factually, the situation in *Spencer* and that of the instant case are remarkably similar. In both cases the incidents of sexual misconduct were numerous and occurring over long periods of time. In *Spencer* over 100 separate acts of sexual contact occurred over 13 months. Here, possibly hundreds if not more separate acts were testified to having occurred over several years time.

During the presentation of the State's case the prosecutor suggested the entire onslaught of sexual misconduct constituted the legal and factual basis for the

ten count indictment. In opening argument the prosecutor at no time attempted to identify ten particular acts. Instead she stated "molestation became a regular event," the defendant "managed to molest and abuse S.T. and J.T. for such an extended period of time," and "both young women will testify and tell you about the years of abuse they suffered at the hands of the defendant."

At trial the girls testified to numerous non-time specific instances of sexual misconduct occurring over several years time. For example, S.T. generically testified that: "I don't remember the first time, but . . . oral contact [with Appellant's penis] was very common by the time we moved back to Prescott"; "many instances [of oral contact] occurred [in Prescott] in his bedroom [where the family lived until J.T. went off to college]"; "over a long [period of] time" there was a "series of [oral] contacts"; After the first incident of sexual intercourse, it occurred "very frequently"; Sexual intercourse was occurring "at least weekly, but sometimes daily"; Sexual intercourse "was occurring commonly in the home"; "It was a very common occurrence [in Yavapai county], at least weekly, if not sometimes daily." "Quite a few [instances of sexual intercourse] occurred before my [15th] birthday".

Similarly, J.T. testified that: "A lot of incidents occurred at different times"; [Sexual intercourse occurred] "through the time I lived at home, it occurred many, many times"; the "instances occurred with greater frequency" [after S.T. left for college]; and sexual intercourse in Prescott "was very frequent, more than one time a day". "When S.T. left it was more frequent than ever . . . at times daily, sometimes weekly".

Therefore, at the close of the State's case the Judge was well aware the charges alleged in the Indictment were based upon numerous episodes of sexual misconduct rendering the indictment "duplicitous" on its face. As was the case in *Spencer* the trial court's admission of numerous incidents of sexual misconduct put Petitioner in jeopardy for only 10 counts, for any one of what may have been hundreds of separate criminal offenses, failing to protect him from further prosecution for the same offenses.

When more than one offense than that charged in the indictment is admitted in evidence, the trial court has the duty to require the State to elect upon which of the offenses it relies for conviction. This rule has been recognized by the Arizona Supreme Court dating back to 1936 wherein the Court held:

> The law is well settled that, where the evidence shows, or tends to show, that several acts of intercourse have occurred between defendant and prosecuting witness, it is incumbent upon the prosecution to elect which one of such acts he relies upon for a conviction. *Hash v. State of Arizona*, 48 Ariz. 43, 50, 59, P.2d 305 (1936).

In the *Counterman* decision the Arizona Court of Appeals, citing *Hash*, noted:

> [The] rational for this rule is that a person has a constitutional right to be put on trial for a single offense, and that he has a right to a unanimous jury verdict with reference to the criminal act for which he was tried. *State v. Counterman*, 8 Ariz. App. 526, 531-32, 448 P.2d 96 (App. 1969).

The rule of law enunciated in *Hash*, and *Counterman* was expanded by the Arizona Court of Appeals in the *Schroeder* decision. In *Schroeder* the defendant argued he was entitled in judgment of acquittal on the basis of an duplicitous indictment. The defendant had been charged in a one count indictment of sexual abuse occurring on a specific date, August 31, 1986. However, at trial, the victim testified to seven separate acts occurring during a 1 ½ hour period on October 31, 1986. The defendant argued he had inadequate notice of the specific act of wrongdoing which constituted the charged offense and there was no way of knowing whether the jury reached an unanimous verdict as to any one incident. *State v. Schroeder*, 167 Ariz. 47, 804, P.2d 776 (App. 1990).

The Court of Appeals distinguished the Arizona Supreme Court's *Spencer* decision on its facts and concluded the defendant was not prejudiced by the form of the indictment because all seven of the fondling acts occurred on one specific evening, as alleged in the indictment. The Court of Appeals also noted the defendant failed to claim insufficient disclosure or that he was in doubt as to the specific acts to which the indictment referred. Consequently, the Court concluded there was no danger he lacked adequate notice of the charges against him or was hindered in the preparation of his defense. *Schroeder*, 167 Ariz. at 52.

Conversely, in the instant case, due to the State's failure to charge the 10 alleged offenses with any specificity as to time, place or occurrence, the Petitioner was hindered in his ability to prepare his defense and unfairly surprised by the evidence admitted at trial. Therefore, unlike *Schroeder* Petitioner's convictions were improperly based upon numerous instances of sexual misconduct

insufficiently identified with any specificity as to time, place or circumstances prior to trial. Under these circumstances, Petitioner could not reasonably have understood with any certainty which specific act each count was based upon. Requiring Petitioner to defend under these circumstances constitutes a violation of Petitioner's Constitutional rights to sufficient notice of the charges against him and the opportunity to adequately prepare his defense.

Schroeder also supports the Petitioner's argument on the double jeopardy issue. The defendant argued that because he was prosecuted at trial based upon multiple allegations of sexual misconduct he was put in jeopardy, in only one count, for several separate acts of criminal wrongdoing in violation of his right to a unanimous jury verdict. *Schroeder* correctly recognized that an indictment which does not comport with Rule 13.3 A.R.C.P., by charging more than one offense in the same count, makes the precise pleading of prior jeopardy an impossibility where the evidence suggests and indefinite number of criminal acts may have been the basis for the conviction. However, the Arizona Court of Appeals determined the defendant could never again be prosecuted for any of the incidents testified to because the seven "specific" acts occurred on one date, they were summarized as such in the indictment, and were specifically introduced into evidence at trial. *Schroeder*, 167 Ariz. at 52.

Unlike *Schroeder*, in the instant case the "acts" alleged and introduced into evidence did not occur on one date, but rather over the course of several years. Furthermore, the acts were not set forth in the grand jury

transcript,[5] the indictment or admitted into evidence with any "specificity" as to time, place or circumstances making the precise pleading of prior jeopardy impossible. Due to the multitude of generic non-time specific acts of sexual misconduct testified to at trial, there is no reasonable probability of juror agreement as to which particular acts formed the basis for the jury's verdicts.

In *Schroeder*, Justice Kleinschmidt stated when presented with a duplicitous indictment the proper procedure is for the trial judge to dismiss the indictment, require the State to elect the act which it alleges constitutes the criminal offense, or alternatively instruct the jury that they must all agree on a specific act that constitutes the offense before the defendant can be found guilty. Justice Kleinschmidt went on to suggest the failure of the trial judge to grant a timely objection to a duplicitous indictment in the face of the improper manner in which the State was presenting its case would be "inexplicable." 167, Ariz. at 54, *citing State v. Kitchen*, 110 Wash. 2d 403, 756 P.2d 105 (1988); *Spencer v. Superior Court*, 136 Ariz. 608, 667 P.2d 1323 (1983).

In *Schroeder*, the Court of Appeals concluded that although the trial court did not follow the "either or rule" it was not prejudicial because only if the jury accepted the victim's version and disbelieved the defendant's version of the events could they find the defendant guilty. The court recognized the defendant's only real defense was his

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[5] It is undisputed no evidence whatsoever was presented to the Grand Jury to support the ten (10) offenses alleged in the indictment. However, the Arizona Court of Appeals held Petitioner waived this issue for purposes of Appeal by failing to object to the Grand Jury proceeding prior to trail. (Appendix A, at 7)

"credibility" in that he denied the offense occurred at all. As Justice Kleinschmidt pointed out, the case was presented to the jury as an "all or nothing" proposition. There was no attempt to "distinguish" between the different acts – the defense was identical as to each of the counts alleged. (*Id.*).

In this case, Petitioner readily admitted several of the acts occurred, but disputed the dates upon which the the acts were alleged to have been committed. Although S.T. and J.T. both testified the acts began prior to their 15th birthdays and continued for years into their early 20s, Petitioner denied the sexual relationship began prior to the girls' 15th birth dates. Therefore, the very error identified by the Arizona Court of Appeals in *Schroeder* occurred in this case because the Petitioner's entire defense was based on distinguishing between when the different acts occurred.

The Trial Court's admission of the "other acts" evidence in conjunction with its failure to either require that the State elect the ten (10) acts it relied on for conviction or, alternatively, instruct the jury it must collectively agree on one specific act before convicting on any one count, constructively expanded the Indictment permitting the jury to convict for any of the multitude of "other acts" of sexual misconduct admitted at trial. This violated Petitioner's Right to be put on trial for a single offense in each count, and to a unanimous jury verdict with respect to each of the ten (10) offenses for which he was tried in violation of his Fourteenth Amendment due process and Fifth and Sixth Amendment rights.

The Insufficiency of the Limiting Instruction

The problem was further compounded by the Trial Court's failure to provide a sufficient limiting instruction

regarding the proper use of the other act evidence. The trial judge's limiting instruction was insufficient because it failed to identify and separate the evidence of each offense from the "other acts." The jury instruction read as follows:

> Other acts: Evidence of other acts of the defendant has been admitted in this case. You must not consider this evidence to prove the defendant's character or that the defendant acted in conformity with that character. You may, however, consider that evidence only as it relates to the defendant's motive, opportunity, intent, preparation and plan. (Appendix D, Instruction J).

Although the instruction cautioned the jury to keep separate the "other acts" evidence from that of each offense, it failed to provide any effective means whatsoever of doing so. This was due to the trial Court's failure to require that the State identify at trial which acts constituted the offense alleged in each count in the indictment. Without any reasonable means of differentiating between the evidence of the ten (10) charged offenses and that of the "other acts," the instruction failed to allow the jury to identify, separate and deliberate the evidence as to each.

The Arizona Court of Appeals determined Petitioner failed to object to the "other acts" instruction and therefore waived the issue for appeal. (Appendix A at 14). Given the Trial Court's previous evidentiary rulings, Petitioner agreed some type of limiting instruction should be given. He clearly identified the problem and insufficiency of the instruction during argument regarding the "on or about" instruction when stating:

> "I think by giving this instruction the way it's stated it misleads the jury to come up and say that, "well, we don't need to figure out exactly what act and when it happened". I say that misleads the jury and because of all the 404(b) or bad character evidence that has been permitted in this case they might not understand the difference between convicting for the 404(b), which is merely used to show some other reason other than the bad character, as opposed to the actual acts that are alleged in the indictment". (R.T. 2/11/98 at 102).

Therefore, contrary to the opinion of the Arizona Court of Appeals, Petitioner did not fail to object to the insufficiency of the limiting instruction. It was the Trial Court's duty to provide the jury with a reasonable means of differentiating between the evidence of the 10 charged offenses and the "other acts". Furthermore, because the jury was not instructed as to which of the multitude of acts testified to constituted the ten (10) offenses, the insufficiency of the limiting instruction was so prejudicial it deprived Petitioner of his right to a fair trial and to a unanimous jury verdict in violation of his Fourteenth Amendment due process right and Fifth and Sixth Amendment rights. *U.S. v. Russell*, 134 F.3d 171 (1998); *Woertman, supra,* 804 P.2d at 190-193.

The Insufficiency of the "Unanimity" Instruction

The Arizona Court of Appeals dismisses Petitioner's claim he was prejudiced by the Trial Court's jury instructions by finding "the jury was [properly] instructed as to the unanimity of it's verdict on each count."

(Appendix A, at 13); Appendix D, Instruction D.) However, the Trial Court's instruction was insufficient because it failed to require that the jury unanimously agree as to which **acts** Petitioner committed "as a step preliminary to determining whether [Petitioner] is guilty of the crime charged." The State introduced hundreds of "acts" of alleged sexual misconduct, but did not require the State or the jury to identify what particular evidence or "acts" constituted the ten (10) charged offenses, and what evidence was admitted as "other acts" for some other purpose. The Trial Court's failure to provide a sufficient unanimity instruction, coupled with the inadequate limiting instruction, makes it impossible to be reasonably certain Petitioner was unanimously convicted by the jury of the same ten (10) acts.

Consequently, the jury instructions at issue erroneously failed to apprise the jury of their responsibility to unanimously identify and agree on which ten (10) acts they relied on in support of conviction on each of the ten (10) counts. This violated Petitioner's Fourteenth Amendment due process right and Fifth and Sixth Amendment rights. *Woertman, supra*, 804 P.2d 188, 191-192; *U.S. v. Russell* 134 F.3d 171, 181-182 (3rd Cir. 1998).

CONCLUSION

The Trial Court's pretrial Evidentiary Rulings regarding the admission of "other acts" evidence, in conjunction with the Court's failure to properly instruct the jury constructively amended the Indictment permitting the jury to convict for any of the "other acts" evidence admitted at trial, many of which occurred subsequent to the two girls' 15th birth dates. This permitted the jury to convict for uncharged and/or non-criminal conduct. In the absence of proper instructions the Indictment was rendered duplicitous, unconstitutionally vague for failure to protect Petitioner's Due Process right to reasonable notice of the charges against him, and hindered his ability to prepare and present a defense. The problem was compounded by the Indictment itself which failed to allege facts specific as to time, place or circumstances sufficient to identify the ten (10) alleged offenses. The Trial Court's general unanimity instruction did not remedy the problem because it failed to instruct the jurors they must unanimously agree on the specific "acts" upon which they relied in support of conviction. The problem was further compounded by the Trial Court's failure to provide a sufficient limiting instruction which would effectively allow the jury to separate the "other acts" evidence from the evidence constituting each offense.

Based upon the foregoing authorities and arguments, Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari and reverse the decision of the Arizona Court of Appeals with directions to remand for a new trial.

Respectfully submitted,

CRAIG C. GILLESPIE
Attorney for Petitioner

APPENDICES

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA	)	1 CA-CR 98-0259
	)	
Appellee,	)	DEPARTMENT C
v.	)	
	)	Yavapai County
GARY REYNOLDS QUALLS,	)	Superior Court
	)	No. CR 97-0747
Appellant.	)	
	)	**O R D E R**

The above-mentioned matter was duly submitted to the Court. The court has this day rendered its memorandum decision.

IT IS ORDERED that the memorandum decision be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order, together with a copy of the memorandum decision, be sent to each party appearing herein or to the attorney for such party, and to the Honorable Howard D. Hinson.

DATED this 13th day of April, 1999.

/s Susan A. Ehrlich
SUSAN A. EHRLICH, Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA	)	1 CA-CR 98-0259
	)	
Appellee,	)	DEPARTMENT C
v.	)	
	)	MEMORANDUM
	)	DECISION
GARY REYNOLDS QUALLS,	)	(Not for Publication -
	)	Rule 111, Rules of the
	)	Arizona Supreme
Appellant.	)	Court)
	)	

Appeal from the Superior Court of Yavapai County
Cause No. CR 97-0747

The Honorable Howard D. Hinson, Judge

AFFIRMED

Janet A. Napolitano, The Attorney General
by Paul J. McMurdie, Chief Counsel, Criminal Appeals Section
Diane M. Ramsey, Assistant Attorney General
Attorneys for Appellee — Phoenix

Toles & Associates, P.C.
By Craig C. Gillespie
Attorneys for Appellant — Phoenix

E H R L I C H, Judge

Gary Reynolds Qualls ("defendant") appeals his convictions and sentences on two counts of child molestation, class 2 felonies (dangerous crimes against children), and eight counts of sexual conduct with a minor, class 2 felonies (dangerous crimes against children).

For the following reasons, we affirm his convictions and sentences.

FACTUAL AND PROCEDURAL BACKGROUND

"ST" was born on September 30, 1972.[1] Her sister, "JT," was born on January 12, 1976. Their mother divorced their father in 1980 and married the defendant in 1981. Shortly after the marriage, the defendant injured his back. He then stayed home, becoming the primary caretaker of the two girls while their mother worked full-time.

From the beginning, the defendant made it his practice to walk about the home nude. He also played numerous physical games with the girls, and he insisted that the entire family shower together, although eventually he showered alone with ST. The defendant then began to give ST massages. When ST was between 12 and 13 years old, the defendant started giving her nude massages which included inserting his fingers inside her vagina.

The entire family was heavily involved in the practice of Eckankar faith, one which involves dream interpretation, reincarnation and belief that a person's past

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[1] We use initials to protect the victims' privacy.

lives have an impact on the present one. The defendant took the leading role in teaching his stepdaughters about the faith and in interpreting the spiritual significance of their dreams. He began having ST perform oral sex on him when she was 13, praising her for this as a sign of faith that she was able to be "open."

When she was 14, ST had a crush on a boy at school. The defendant told her that the boy was a "spiritual vampire" who was attacking her psychically. Although ST did not want to believe that her classmate was a vampire, she accepted that the defendant was her spiritual teacher, and he offered may "spiritual proofs" that the boy was "draining" her energy. To "protect" ST from this vampire, the defendant then began having sexual intercourse with her on a weekly, sometimes daily, basis. He insisted that this was necessary to break her bond with the vampire.

On one occasion, ST had come home from the hospital to recuperate from surgery for scoliosis. The defendant climbed on top of her and started having intercourse. Although ST complained that each thrust was hurting her incision, the defendant continued until he ejaculated.

At the time of ST's surgery, the defendant began giving nude massages to JT, who then was twelve. The defendant told the younger girl that her reluctance to perform oral sex on him was a "spiritual problem." He also told JT that they had been married in a past life. He even bought a ring for her to wear and placed it on her finger while he performed a "ceremony." He began having sexual intercourse with JT when she was 13 years old.

The defendant's molestations of ST ended when she went away to college and learned "that this wasn't the type of life that normal people lived." By that time, the defendant was having intercourse with her younger sister on a regular basis.

Neither girl discussed the defendant's activities - even with each other - until they were in their early twenties. In June 1996, they told their mother and then their father, who immediately contacted the police. A police investigator gave the mother equipment allowing her to tape-record a telephone conversation with the defendant. On that tape-recording, the defendant admitted having sex with both of his stepdaughters since they were 13 or 14 years old. He also to ST's therapist that they had six when the girl was 14.

Subsequently, a detective also recorded a telephone interview with the defendant. Again the defendant admitted to having sex with the girls from the time they were 14.

At trial, the defendant admitted having sex with both of his stepdaughters. However, he testified that it did not start until the girls were 16. He claimed that he had lied to their mother, to the therapist and to the police in order to protect the girls' reputation.

The jury convicted the defendant and charged with two counts of child molestation and eight counts of sexual conduct with a minor. He was sentenced to presumptive terms of 17 years in prison on each of the child-molestation charges and to presumptive terms of twenty years on each of the sexual-conduct charges. All sentences are consecutive.

Now on appeal, the defendant contends that (1) there were several errors in the grand jury proceedings, including the return of an allegedly "duplicitous" indictment; (2) the statute of limitations in Arizona Revised Statutes ("A.R.S.") section 13-107(B) is unconstitutional; (3) the trial court abused its discretion in admitting so-called "other acts" evidence of sexual misconduct, and (4) the trial court failed to properly instruct the jury on the pertinent law.

DISCUSSION

1. Grand Jury Proceedings

The defendant argues that the trial court erred in several respects in failing to dismiss the indictment. Specifically, he first maintains that the grand jury failed to hear sufficient evidence. Second, he contends that the indictment was devoid of the requisite specificity, thus providing no notice of the criminal acts against which he had to defend. Third, he complains of a superseding indictment. All of these issues were, however, waived.

The defendant filed a pre-trial motion to dismiss, alleging only that the statute of limitations had run. At the close of the state's case, the defendant moved for a directed verdict pursuant to Arizona Rules of Criminal Procedure ("Rule") 20, arguing that the acts were not specifically "deliberated or determined by the Grand Jury ... ." In denying the motion, the trial court said:

> To the extent you're suggesting that the Grand Jury lacked probable cause to return the Indictment, that portion of your motion or argument is not timely in accordance with the Rules, thus I think the only analysis to

> be made at this time is whether the evidence presented at trial supports the State's allegation to the extent necessary to survive a Rule 20 Motion.

The defendant said nothing about any defect in the indictment.

The defendant now insists that the trial court "lacked jurisdiction" over the "state's evidence" because the grand jury did not hear sufficient evidence supporting the indictment. However, grand-jury proceedings may be challenged only by a motion for a new finding of probable cause in accordance with Rule 12.9. At best, the defendant put forth his argument only as part of a Rule 20 motion, which the trial court correctly denied as untimely. Of greater significance is that this issue was made moot by the guilty verdicts. *State v. Haas*, 138 Ariz. 413, 426, 675 P.2d 673, 686 (1983); *State v. Krantz*, 174 Ariz. 211, 212-13, 848 P2.d 296, 297-98 (App. 1992).

The defendant made no other motion before or during trial to cure alleged defects in the indictment.[2] The failure to object to a defect in the charging document prior to trial constitutes a waiver of that objection. *State v. Fullem*, 185 Ariz. 134, 136, 912 P.2d 1363, 1365 (App.

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In terms of notice, the state's Rule 15 disclosure statement provided the defendant with photographs of the victims, tape-recordings of interviews of the victims and their mother, transcripts of the defendant's recorded statements, a time-line prepared by the victims, excerpts from one victim's diary and police reports. Further, the defendant never denied having sexual contact with the victims; he only contested their ages when it occurred.

1995); *see* ARIZ.R.CRIM.P. 13.5(c); 16.1(b)(c). In particular, the failure to argue that the indictment is duplicitous either prior to or during trial constitutes a waiver of that objection. *State v. Rushton*, 172 Ariz. 454, 455-56, 837 P.2d 1189, 1190-91 (App.1992); *State v. Kelly*, 149 Ariz. 115, 117, 716 P.2d 1052, 1054 (App. 1986)[3]

The defendant alleges error because the first indictment against him was dismissed, and he was prosecuted pursuant to a more specific, superseding indictment. This claim is totally without merit. A superseding indictment may be returned any time prior to trial. *State v. Superior Court (Hutton)*, 137 Ariz. 534, 536, 672 P.2d 199, 201 (App. 1983).

As a fourth issue, the defendant alleges that counts nine and ten prejudiced him because A.R.S. section 13-1405 was amended, effective September 27, 1990, to require that the victim to be less than 14 years old, instead of 15. *See* Laws 1990, ch. 384 § 4. He argues that the jury could have convicted him of an offense that was no longer proscribed by law. *State v. Hamilton*, 177 Ariz. 403, 405-06, 868 P.2d 986, 988-89 (App.1993). This argument pertains not to the grand-jury proceedings bu to the sufficiency of the evidence before the petit jury. However,

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[3] The defendant attempts to circumvent this proposition by misciting *State v. Jannamon*, 169 Ariz. 435, 439, 819 P.2d 1021, 1025 (App. 1991), for the proposition that "this type of defect in the charging document constitutes fundamental error and can be raised for the first time on appeal." The court in *Jannamon* held that the error which is fundamental is to "convict a person for a crime when the evidence does not support a conviction." *Id.* It does not support the defendant's contention that a defect in the charging document is necessarily fundamental.

because this issue is being raised in this context, we will address it similarly.

Counts nine and ten charged that, "on or about between August 1990 and September 26, 1990, the defendant engaged in sexual intercourse or oral sexual contact with" JT. At trial, JT testified that her sister went away to college in August 1990 and that, between then and September 26, sexual intercourse occurred "at times daily, sometimes weekly." It was uncontroverted that JT was 14 at the time. Her testimony regarding the molestations during this time was sufficient to support the defendant's convictions.

II. Statute of Limitations

The defendant asserts that prosecution of him was barred because he was indicted after the seven-year period in the statute of limitations. A.R.S. § 13-107(B)(1).[4] The Arizona criminal statutes of limitations are explicit: They do not begin to run until the state, or the political subdivision of the state having jurisdiction, actually discovers, or should have discovered, that the offense occurred.[5]

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"Except as otherwise provided in this section, prosecutions...must be commenced within the following periods after actual discovery by the state or the political subdivisions having jurisdiction of the offense or discovery by the state...which should have occurred with the exercise of reasonable diligence, whichever occurs first: 1. For a class 2...felony, seven years."

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The defendant cites several cases for the proposition that a statute of limitations runs from the time an offense is completed. *E.g., Doe v. Roe*, 191 Ariz. 313, 955 P.2d 951 19 (1998); *Fogel*, 16 Ariz. App. 246, 492 P.2d 742. However, the cases cited by the defendant construe statutes of

There is no dispute that the police first learned of the crimes in June 1996 and that the defendant was indicted less than a year later. Nor is there any allegation that the police acted with anything other than diligence in investigating the case. This prosecution was not barred by A.R.S. section 13-107(B).

For the first time on appeal, the defendant also argues that the trial court's interpretation of A.R.S. section 13-107(B), one identical to ours above, renders it unconstitutional. This argument is waived. The statute of limitations is an affirmative defense which must be raised at trial. *United States v. LeMaux*, 994 F.2d 684, 689 (9th Cir.1993); *United States v. Akmakjian*, 647 F.2d 12, 14 (9th Cir.), *cert. denied* 454 U.S. 964 (1981); *see also, Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917).

III. "Other Acts" Evidence

Prior-act evidence usually is not admissible at trial, although it may be to establish "motive, intent, absence of mistake or accident, identity and common scheme or plan." *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997). Before admitting testimony about a defendant's prior acts, the trial court must find by clear and convincing evidence that the acts alleged occurred. *Id.* at 584, 944 P.2d at 1198. It must then balance the probative value of such evidence against its potential for unfair prejudice. *State v.*

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limitations with language differing from that in A.R.S. section 13-107 on this specific point. *See State v. Escobar-Mendez*, 1 CA-CR 97-0999 (App., Feb. 25, 1999)(statute of limitations begins to run when state or political subdivision discovers offense).

Salazar, 181 Ariz. 87, 91, 887 P.2d 617, 621 (App. 1994). We will not reverse the court's decision absent a clear abuse of its discretion. *See State v. Varela*, 178 Ariz. 319, 323, 873 P.2d 657, 661 (App. 1993).

At a pre-trial hearing held pursuant to Arizona Rule of Evidence 404(b), the prosecutor argued that the prior-act evidence would show that the defendant was "grooming" his stepdaughters for an eventual sexual relationship - progressing from frequent touchings to massages, then to nude massages with genital stimulation, culminating in oral sex and sexual intercourse. The prosecutor advised the court that the victims would testify that sexual intercourse was occurring on a daily basis for several years but that she would not ask specifically about "how many times." The court ruled that the acts were admissible to show intent, plan, preparation and absence of mistake or accident.

Evidence admitted to show a common scheme or plan must be narrowly-focused to demonstrate that the other act is part of "a particular plan or which the charged crime is also a part." *State v. Ives*, 187 Ariz. 102, 107, 927 P.2d 762, 767 (1996), citing *State v. Ramirez Enriquez*, 153 Ariz. 431, 433, 737 P.2d 407, 409 (App. 1987). "The distinction is between proving a specific plan embracing the charged crime and proving a general commitment to criminality which might well have involved the charged crime." *Id.*

The defendant's interactions with his stepdaughters progressed along a well-defined and obvious continuum - from physical games involving a lot of touching to massages to showers together to nude massages and so forth. This demonstrates "grooming activity" designed to prepare the girls for more intimate contact with the defendant, i.e., that these acts were part of the defendant's

plan to commit the particular crimes with which he was charged. *See State v. Grainge*, 186 Ariz. 55, 57-58, 918 P.2d 1073, 1075-76 (App. 1996)(having 14-year-old boy perform oral sex and masturbate admissible as evidence of "plan" under Rule 404(b)).

Moreover, in the guise of being her spiritual teacher, the defendant advised ST that she had to have repeated sexual intercourse with him in order to break her bond with the boy who supposedly was a "spiritual vampire." Similarly, the defendant told JT that he had been her husband in a past life and the he could tell from her dreams that she needed to have sexual relations with him. This, too, was clear evidence of the defendant's plan to have ongoing sexual relations with these girls.

The defendant also argues that the trial court never weighed the probative value of this testimony against its potential prejudice. However, the record shows that both counsel discussed potential prejudice in the Rule 404(b) hearing and that the court considered it in precluding other material. *See State v. Bolton*, 182 Ariz. 290, 305, 896 P.2d 830, 845 (1995)(appellate court may infer a trial court finding that probative value outweighed prejudice from denial of motion to suppress).

Further, at trial, the defendant admitted that he had ongoing sexual relationships with both of his stepdaughters. There was no actual dispute over whether these "other acts" occurred, just when. The trial court did not abuse its discretion.

IV. Jury Instructions

The defendant claims that the trial court erred in failing to require the state to elect the specific acts that it was charging the defendant had committed and in failing to instruct the jurors that they had to unanimously agree on a specific act before returning a guilty verdict on any one count. Focusing as he does on counts nine and ten, the gravamen of the defendant's argument is that the state failed to carry its burden of proof because it did not prove the exact dates when the defendant had sexual contact with JT.

In counts nine and ten, it was charged that, "on or about between August 1990 and September 26, 1990, the defendant engaged in sexual intercourse or oral sexual contact with" JT. At trial, JT testified that, between the time when her sister went away to college in August 1990 an September 26 of that year, sexual intercourse occurred "at times daily, sometimes weekly."

The jury was instructed as to the requisite unanimity of its verdict on each count. The defendant made no object to the absence of instructions of which he now complains. We therefore review only for fundamental error, *State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994), and we find none.

The state does not have to prove and exact date in these circumstances, *State v. Jones*, 188 Ariz. 534, 543-44, 937 P.2d 1182, 1191-92 (App. 1996)(indictment alleged broad period of time in which molestations occurred); *State v. Smith*, 156 Ariz. 518, 524, 753 P.2d 1174, 1180 (App. 1987)(state does not have to prove exact date charged); *State v. Berry*, 101 Ariz. 310, 314, 419 P.2d 337, 341 (1966) (six-year-old's uncertainty as to exact date of assault

not sufficient grounds for declaring fatal variance between charge and evidence), particularly since the defendant does not allege that he was prejudiced in his defense. *Jones*, 188 Ariz. at 543-44, 937 P.2d at 1191-92. There is no error necessitating reversal.

The defendant also alleges error in the "other act" instruction. At trial, he did not object to the instruction, and he has, therefore, waived this issue absent fundamental error. *Gallegos*, 178 Ariz. at 11, 870 P.2d at 1107. We have previously held that giving an instruction essentially identical to the one given here is not fundamental error. *State v. Corona*, 188 Ariz. 85, 90, 932 P.2d 1356, 1361 (App. 1997).

CONCLUSION

We affirm the defendant's convictions and sentences.

s/ Susan A. Ehrlich
SUSAN A. EHRLICH, Judge

CONCURRING:

s/ William F. Garbarino
WILLIAM F. GARBARINO, Presiding Judge

s/ Rebecca W. Berch
REBECCA WHITE BERCH, Judge

SUPREME COURT
STATE OF ARIZONA
402 Arizona State Courts Building
1501 West Washington Street
Phoenix, Arizona 85007-3231

October 28, 1999

RE: STATE OF ARIZONA vs. GARY REYNOLDS QUALLS
Supreme Court No. CR-99-0166-PR
Court of Appeals No. 1 CA-CR 98-0259
Yavapai County No. CR 97-0747

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 26, 1999, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to Court of Appeals, Division One, Phoenix, this 28th day of October, 1999.

NOEL K. DESSAINT, Clerk

TO:
Hon. Janet A. Napolitano, Arizona Attorney General
Attn: Paul J. McMurdie, Esq. and Diane M. Ramsey, Esq.
Craig C. Gillespie, Esq.
Gary R. Qualls, DOC 134601, Arizona State Prison, Eyman
Glen D. Clark, Clerk, Court of Appeals Division One, Phoenix
Lexis-Nexis
West Publishing Company

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA	)	Superior Court
	)	No.CR970747
	)	
Plaintiff,	)	Grand Jury No. 80-GJ-
	)	12010
v.	)	
	)	Division PT
GARY REYNOLDS QUALLS,)		
	)	**INDICTMENT**
Defendant.	)	**FELONY**
	)	

The grand jurors of Yavapai County, Arizona, accuse GARY REYNOLDS QUALLS charging that in PRESCOTT Precinct, Yavapai County, State of Arizona:

COUNT I

On or about between September 1985 and September 1986, GARY REYNOLDS QUALLS knowingly molested SHANA TURRELL, a child under fifteen years of age, by directly or indirectly touching the private parts of SHANA TURRELL, and/or causing SHANA TURRELL to touch the private parts of GARY REYNOLDS QUALLS, in violation of A.R.S. §§13-1410, 13-701, 13-702, 13-801 and 13-604.01.

COUNT II

On or about between January 1987 and February 1987, GARY REYNOLDS QUALLS intentionally or knowingly engaged in sexual intercourse or oral sexual contact with SHANA TURRELL, who was under the age of fifteen years, in violation of A.R.S. §§13-1405, 13-1401, 13-701, 13-702, 13-801 and 13-604.01.

COUNT III

On or about between March 1987 and June 1987, GARY REYNOLDS QUALLS intentionally or knowingly engaged in sexual intercourse or oral sexual contact with SHANA TURRELL, who was under the age of fifteen years, in violation of A.R.S. §§13-1405, 13-1401, 13-701, 13-702, 13-801 and 13-604.01.

COUNT IV

On or about between June 1987 and August 1987, GARY REYNOLDS QUALLS intentionally or knowingly engaged in sexual intercourse or oral sexual contact with SHANA TURRELL, who was under the age of fifteen years, in violation of A.R.S. §§13-1405, 13-1401, 13-701, 13-702, 13-801 and 13-604.01.

COUNT V

On or about between September 1, 1987 and September 29, 1987, GARY REYNOLDS QUALLS intentionally or knowingly engaged in sexual intercourse or oral sexual contact with SHANA TURRELL, who was

under the age of fifteen years, in violation of A.R.S. §§13-1405, 13-1401, 13-701, 13-702, 13-801 and 13-604.01.

COUNT VI

On or about between January 1988 and January 1990, GARY REYNOLDS QUALLS knowingly molested JENNY TURRELL, a child under fifteen years of age, by directly or indirectly touching the private parts of JENNY TURRELL, and/or causing JENNY TURRELL to touch the private parts of GARY REYNOLDS QUALLS, in violation of A.R.S. §§13-1410, 13-701, 13-702, 13-801 and 13-604.01.

COUNT VII

On or about between January 1990 and July 1990, GARY REYNOLDS QUALLS intentionally or knowingly engaged in sexual intercourse or oral sexual contact with JENNIFER TURRELL, who was under the age of fifteen years, in violation of A.R.S. §§13-1405, 13-1401, 13-701, 13-702, 13-801 and 13-604.01.

COUNT VIII

On or about between July 1, 1990 and August 31, 1990, GARY REYNOLDS QUALLS intentionally or knowingly engaged in sexual intercourse or oral sexual contact with JENNIFER TURRELL, who was under the age of fifteen years, in violation of A.R.S. §§13-1405, 13-1401, 13-701, 13-702, 13-801 and 13-604.01.

COUNT IX

On or about between August 1990 and September 26, 1990, GARY REYNOLDS QUALLS intentionally or knowingly engaged in sexual intercourse or oral sexual contact with JENNIFER TURRELL, who was under the age of fifteen years, in violation of A.R.S. §§13-1405, 13-1401, 13-701, 13-702, 13-801 and 13-604.01.

COUNT X

On or about between August 1990 and September 26, 1990, GARY REYNOLDS QUALLS intentionally or knowingly engaged in sexual intercourse or oral sexual contact with JENNIFER TURRELL, who was under the age of fifteen years, in violation of A.R.S. §§13-1405, 13-1401, 13-701, 13-702, 13-801 and 13-604.01.

November 20, 1997
Dated

By s/ Thomas C. Thurston
Deputy County Attorney

A TRUE BILL
(Foreman writes "A True Bill"
s/ JoAnn Flinn
Foreman of the Grand Jury

D. Separate Counts:
Each count charges a separate and distinct offense. You must decide each count separately on the evidence with the law applicable to it, uninfluenced by your decision on any other count. You may find that the State has proved beyond a reasonable doubt, all, some, or none of the charged offenses. Your finding for each count must be stated in a separate verdict.

I. "On or About":
The Indictment in this case alleges that the events occurred "on or about." In determining whether the State has met its burden of proving that a particular offense did occur, it is not necessary that the State prove the exact date or period when the offense occurred. In order to support a conviction for any charge the evidence must isolate, identify and prove beyond a reasonable doubt that the act alleged in support of the charge did occur, that it occurred on or about the date alleged and that it occurred prior to the filing of the Indictment.

J. Other Acts:
Evidence of other acts of the defendant has been admitted in this case. You must not consider this evidence to prove the defendant's character or that the defendant acted in conformity with that character. You may however, consider that evidence only as it relates to the defendant's motive, opportunity, intent, preparation and plan.

C. Sexual Conduct With a Minor Under Age Fifteen:
A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under fifteen years of age.

F. Molestation of a Child:
The crime of molestation of a child requires proof that the defendant knowingly touched, directly or indirectly, the private parts of a child under the age of fifteen years or caused a child under the age of fifteen to touch, directly or indirectly, the private parts of defendant.

All twelve of you must agree on a verdict on each count you consider. All twelve of you must agree whether the verdict is guilty, or not guilty. When you go to the jury room, you will choose a foreman who will be in charge during your deliberations and who will sign any verdict that you reach.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA	) No. CR) 970146/970747
Plaintiff,	)
vs.	) VERDICT
GARY REYNOLDS QUALLS,	) (Count I)
Defendant.	)

We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the Defendant, Gary Reynolds Qualls:

[Mark one box only]

☐ guilty

☐ not guilty

of Count I of the Indictment, Molestation of Shana Turrell, a Child Under the Age of 15, committed on or about between September, 1985, and September, 1986.

_____
Foreman